

FILE COPY

STATE OF WISCONSIN
BEFORE THE FUNERAL DIRECTORS EXAMINING BOARD

IN THE MATTER OF THE
APPLICATION FOR A RENEWAL
LICENSE TO PRACTICE AS A
FUNERAL DIRECTOR OF

NEIL F. WIENKE,
APPLICANT.

FINAL DECISION
AND ORDER
LS9705231FDR

The State of Wisconsin, Funeral Directors Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Funeral Directors Examining Board

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 1ST day of OCTOBER 1997.

D. Bruce Carlson / c.f.A.
A Member of the Board

STATE OF WISCONSIN
BEFORE THE FUNERAL DIRECTORS EXAMINING BOARD

IN THE MATTER OF THE APPLICATION :	
FOR A RENEWAL LICENSE TO :	
PRACTICE AS A FUNERAL DIRECTOR OF :	PROPOSED DECISION
:	
NEIL F. WIENKE, :	(Case No. LS 9705231 FDR)
APPLICANT. :	

The parties to this proceeding for the purposes of sec. 227.53, Stats., are:

Neil F. Wienke
83 Oak Grove Drive
Madison, WI 53717

State of Wisconsin
Funeral Directors Examining Board
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

State of Wisconsin
Department of Regulation and Licensing
Division of Enforcement
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

A hearing was conducted in this matter on June 18, 1997. The applicant, Neil F. Wienke, appeared personally. The state appeared by attorney, Steven M. Gloe.

On the basis of the entire record, the administrative law judge recommends that the Funeral Directors Examining Board adopt as its final decision in this proceeding the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. The applicant, Neil F. Wienke (D.O.B. 11/10/42), 83 Oak Grove Drive, Madison, Wisconsin 53717, was duly licensed in the state of Wisconsin as a funeral director, pursuant to license #2775 initially granted on August 16, 1965.

2. Mr. Wienke left the active practice of funeral directing in 1977. Since 1977, Mr. Wienke has maintained a current funeral director's certificate in good standing.

3. Mr. Wienke has worked from May, 1977 through to the present in casket sales. Additionally, he has been involved in activities related to the funeral directing profession, including the coordination and presentation of continuing education programs, providing numerous "funeral analyses" for consumers, acting as President of the South Central Funeral Directors Association, serving on the Board of Directors of the Wisconsin Funeral Directors Association and functioning as its registered lobbyist.

4. Although not required to do so under his certificate in good standing, Mr. Wienke has obtained at least 15 credits of continuing education in each of the bienniums from 1984-85 through 1996-97, with the exceptions of 1990-91 and 1992-93.

5. On or about June 28, 1996, Mr. Wienke made application for the renewal of his funeral director's license.

6. On July 9, 1996, the Funeral Directors Examining Board determined that Mr. Wienke should be required to pass the initial licensure examination prior to being permitted to renew his funeral director's license.

7. Subsequent correspondence between Mr. Wienke and staff assigned to the board establish Mr. Wienke's disagreement with the board's determination that his absence from the actual practice of funeral directing for approximately 20 years, justified it in requiring him to take and pass the initial licensing examination.

8. On April 4, 1997, a Notice of Denial of Mr. Wienke's application for renewal of his funeral director's license was issued.

CONCLUSIONS OF LAW

1. The Funeral Directors Examining Board has jurisdiction in this proceeding pursuant to ch. 445, Wis. Stats.

2. As the holder of a certificate of good standing, Mr. Wienke has the right to renew his funeral director's license under sec. 445.06, Stats., subject to the limitations upon that right set forth in sec. 440.08(3)(b), Stats., and sec. FD 1.10(3), Wis. Adm. Code.

3. The fact that Mr. Wienke has not actively practiced as a funeral director since 1977, constitutes a reasonable basis upon which the Funeral Directors Examining Board may deny his application for a renewal of his license.

4. The fact that Mr. Wienke has not actively practiced as a funeral director since 1977, constitutes a reasonable basis upon which the Funeral Directors Examining Board may require that he complete and successfully pass the initial licensure examination prior to granting the renewal of his license.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the denial by the Funeral Directors Examining Board of the application of Neil F. Wienke to renew his license to practice as a funeral director be, and hereby is, affirmed, and the application is therefore denied.

OPINION

The facts underlying Mr. Wienke's application for renewal of his funeral director's license are not in material dispute. Mr. Wienke was granted a license to practice as a funeral director in 1965. He decided to cease practice in May, 1977. When Mr. Wienke went "inactive" as a funeral director, sec. 445.06, Stats., required that his license not be renewed; but rather, that he be issued a "certificate of good standing". The distinction between the two credentials being that a funeral director's license is reserved to those in actual active practice, while non-practicing funeral directors receive a certificate of good standing.

Since terminating his practice of funeral directing 20 years ago, Mr. Wienke has developed a distinguished career in funeral related fields in addition to working as a casket sales representative. His resume indicates that Mr. Wienke has had substantial experience in the coordination and presentation of continuing education programs and providing funeral analyses for consumers. Mr. Wienke has also served as President of the South Central Funeral Directors Association. He has further served on the Board of Directors of the Wisconsin Funeral Directors Association and acted as its registered lobbyist. (Exhibit 15). Additionally, the record indicates Mr. Wienke has obtained at least 15 credits of continuing education in each of the bienniums spanning 1984-85 through 1996-97, with the exceptions of 1990-91 and 1992-93. (Exhibits 2-7).

With this background, Mr. Wienke filed an application for renewal of his funeral director's license on or about June 28, 1996. In doing so, he relied upon that portion of the requirements for reinstatement within sec. 445.06, Stats., stating that a holder of a certificate in good standing,

"... shall be entitled to a renewal license at any time during that license period, when located at a recognized funeral establishment, without payment of any additional renewal fee. The applicant must also furnish proof of completion of at least 15 hours of continuing education during the previous 2-year licensure period..." (Emphasis, added).

On July 9, 1996, the Funeral Directors Examining Board ("board") reviewed Mr. Wienke's application. The board noted that Mr. Wienke had not actually practiced funeral directing for about 20 years and, due to this lengthy absence from practice, informed him that it would be necessary for him to take and pass the initial licensure examination before his funeral director's

license would be renewed. In arriving at this determination, the board indicated it derived its authority to impose such a requirement from sec. 440.08(3), Stats., and a rule the board had promulgated thereunder.

Sec. 440.08(3)(b), Stats., authorizes the board, as well as other credentialing authorities within the department to:

“ . . . promulgate rules requiring the holder of a credential who fails to renew the credential within 5 years after its renewal date to complete requirements in order to restore the credential, in addition to the applicable requirements for renewal established under chs. 440 to 480, that the . . . board . . . determines is necessary to protect the public health, safety or welfare.” (Emphasis, added).

Pursuant to the authority granted under the statute, the board promulgated sec. FD 1.10(3), Wis. Adm. Code, effective October 1, 1993. In material part, the rule provides that in circumstances where application for renewal of a funeral director's license is made more than 5 years after its renewal date:

“ . . . the board may require demonstration of competence by various methods, including, but not limited to, written or oral examination, documentation of funeral directing work in other jurisdictions, or documentation of current education or experience in the field. . . .”¹

Mr. Wienke contends that the explicit and sole requirements for reinstatement of a license as a funeral director for individuals holding current certificates of good standing are contained in sec. 445.06, Stats. The statutory language specifically states that a holder of a certificate in good standing “shall be entitled” to a license without paying any additional fee. The only requirement provided in the statute for transforming a certificate of good standing into a license to practice funeral directing, is the completion of 15 hours of continuing education during the prior biennial licensing period, a prerequisite met by Mr. Wienke.

On the other hand, the state contends that sec. 445.06, Stats., is not to be read in a vacuum, but must be considered in conjunction with the subsequently enacted statutes and rule that also specifically address the renewal of a funeral director's license. The board's rationale is expressed in the September 5, 1996 correspondence to Mr. Wienke (Exhibit 1, pp. 8-9), as follows:

“ . . . §445.06 of the Wisconsin statutes . . . provides that a funeral director who is not doing business at a recognized funeral establishment may nevertheless apply for a certificate in good standing. Persons holding such certificates are entitled to a renewal license at any time during that license period when they are located at a

¹ Both sec. 480.08(3)(b), Stats., and the administrative rule prohibit the board from imposing additional renewal requirements which are greater than those required to obtain an original funeral director's license. The board's authority to require passage of the initial examination for license renewal under these provisions in appropriate cases is not contested here.

recognized funeral establishment. . . . This section gives an individual who holds a certificate in good standing the *right to renew* his funeral director license. However, that right is not absolute and must be considered together with secs. 440.08 (3) (b), Stats. and FD 1.10 (3), Wis. Admin. Code.

“Holding a certificate in good standing allows an individual the right to renew it, but does not guarantee the automatic reinstatement of a license.” (Emphasis, in original).

The board’s position is sound. That is, sec. 445.06, Stats., must not be read in isolation from other laws directed at the renewal of a funeral director’s license. They must be read together in order to extract the renewal requirements applicable in this case.

In addition to the rationale supplied by the board in the above-cited correspondence to Mr. Wienke, the express language utilized in sec. 440.08(3)(b), makes it clear that the board may impose additional requirements by rule to those set forth in sec. 445.06, Stats. Again, the applicable language in sec. 440.08(3)(b), Stats, specifically and unambiguously states that boards may adopt rules providing for the completion of requirements:

“ . . . in addition to the applicable requirements for renewal established under chs. 440 to 480. . . .

The board has enacted requirements in addition to those contained in sec. 445.06, Stats., for renewal of a funeral director’s license. Sec. 440.08(3)(b), Stats., gives it the specific authority to do so. Accordingly, Mr. Wienke’s claim that he is entitled to the automatic renewal of his funeral director’s license at this time is not supported in law.

Mr. Wienke also contends that the board was required to provide individual and personal notice to every holder of a certificate in good standing that it had promulgated, or intended to promulgate, sec. FD 1.10(3), Wis. Adm. Code, which became effective on October 1, 1993. However, no legal requirement exists mandating the board to provide personal notice to every individual who might be affected by a new administrative rule. The legal “public notice” requirements and other specified promulgation procedures are set forth in Ch. 227, Stats. There is no claim that the board violated any of those provisions in adopting sec. FD 1.10(3). In fact, documentation submitted into the record indicates that the board met the rule promulgation requirements. (Exhibits 8-11).

Mr. Wienke also questions the value of a certificate of good standing, which is biennially renewed for a fee, if it confers no greater rights than those possessed by individuals who allow their license to expire and do not bother to obtain a certificate in good standing. He contends that there must be some right, authority or privilege granted by a certificate of good standing, not possessed by those who do not hold the credential. Otherwise, Mr. Wienke suggests, the statute essentially perpetrates a fraud to collect revenue.

The state did not respond directly to this question. On its face, the statute does not appear to confer any obvious benefit upon a person possessing, and paying for, a certificate of good standing. However, a holder of a certificate in good standing, unlike a licensee, is not required to complete the biennial continuing education requirements in order to obtain renewal of the certificate. See, FDE 4.05, Wis. Adm. Code. When the certificate holder desires to regain his or her license, only proof of having taken 15 credits of continuing education in the previous biennium is necessary to meet that particular requirement; whereas a licensee would be required to meet the continuing education requirement in each and every biennium. Clearly, however, this "benefit" for non-active funeral director certificate-holders is no longer as great as in the past, given the current "5 year" renewal rule.

However, it is reasonable to assume that Mr. Wienke's having held a certificate of good standing at the time he applied for renewal of his funeral director's license may well have impacted upon the board's decision to require only passage of an examination to obtain renewal after 20 years of non-practice. One can easily envision situations in which it would not only be reasonable, but necessary for the board to require additional education in mortuary science and the completion of an apprenticeship prior to renewing a license that had expired 20 years previously.² It did not impose those conditions in this case. Mr. Wienke's having possessed a certificate of good standing, along with his solid background in the funeral related industry, supply strong reason for not doing so.

The board's determination that Mr. Wienke take and pass the original examination leading to a funeral director's license is a reasonable one and within the board's discretion to require. Unquestionably, Mr. Wienke has been closely associated with the funeral directing profession over the last 20 years. He has undoubtedly established a distinguished record of service to the funeral directing profession and its professional associations. Nevertheless, he has not actually *practiced* funeral directing in over 20 years. Under such circumstances, the board's determination that he pass the licensing examination is not unreasonable.

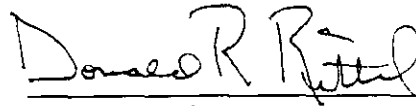
Finally, Mr. Wienke expresses concern that there are individuals possessing a funeral director's license, rather than a certificate of good standing, who are renewing their licenses without "penalty" despite their not being engaged in active practice. Unfortunately, that may be the case. However, those individuals are not before the board and not a part of this proceeding. There is no evidence that Mr. Wienke is being improperly singled-out for board scrutiny. In fact, the record indicates that the board has imposed the same examination requirement upon other holders of certificates in good standing prior to permitting the renewal of an active funeral director's license. (Exhibit 1, p. 9).

The board's denial of the renewal of the license of Mr. Wienke to practice as a funeral director until such time as he takes and passes the initial licensure examination is affirmed.

² Education and apprenticeship experience are requirements for original licensure set forth in sec. 445.045(1), Stats., which the board has the authority under sec. 440.08(3), Stats., and sec. FD 1.10(3), Wis. Adm. Code., to impose as additional requirements for renewal in appropriate cases.

Dated this 22nd day of August, 1997.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Donald R. Rittel", written over a horizontal line.

Donald R. Rittel

Administrative Law Judge

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STATE OF WISCONSIN
DEPARTMENT OF REGULATION AND LICENSING
BEFORE THE FUNERAL DIRECTORS EXAMINING BOARD

In the Matter of the Application for a Renewal License to Practice as a Funeral Director of

Neil F. Wienke,

AFFIDAVIT OF MAILING

Applicant.

STATE OF WISCONSIN)
)
COUNTY OF DANE)

I, Kate Rotenberg, having been duly sworn on oath, state the following to be true and correct based on my personal knowledge:

1. I am employed by the Wisconsin Department of Regulation and Licensing.

2. On October 2, 1997, I served the Final Decision and Order dated October 1, 1997, LS9705231FDR, upon the Applicant Neil F. Wienke by enclosing a true and accurate copy of the above-described document in an envelope properly stamped and addressed to the above-named Applicant and placing the envelope in the State of Wisconsin mail system to be mailed by the United States Post Office by certified mail. The certified mail receipt number on the envelope is P 221 159 577.

3. The address used for mailing the Decision is the address that appears in the records of the Department as the Applicant's last-known address and is:

Neil F. Wienke
83 Oak Grove Drive
Madison WI 53717

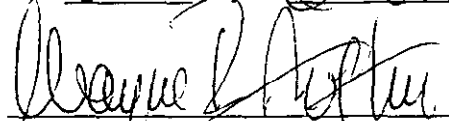


Kate Rotenberg

Department of Regulation and Licensing
Office of Legal Counsel

Subscribed and sworn to before me

this 2nd day of October, 1997.



Notary Public, State of Wisconsin

My commission is permanent.

NOTICE OF APPEAL INFORMATION

Notice Of Rights For Rehearing Or Judicial Review, The Times Allowed For Each. And The Identification Of The Party To Be Named As Respondent.

Serve Petition for Rehearing or Judicial Review on:

STATE OF WISCONSIN FUNERAL DIRECTORS EXAMINING BOARD

1400 East Washington Avenue

P.O. Box 8935

Madison, WI 53708.

The Date of Mailing this Decision is:

October 2, 1997

1. REHEARING

Any person aggrieved by this order may file a written petition for rehearing within 20 days after service of this order, as provided in sec. 227.49 of the *Wisconsin Statutes*, a copy of which is reprinted on side two of this sheet. The 20 day period commences the day of personal service or mailing of this decision. (The date of mailing this decision is shown above.)

A petition for rehearing should name as respondent and be filed with the party identified in the box above.

A petition for rehearing is not a prerequisite for appeal or review.

2. JUDICIAL REVIEW.

Any person aggrieved by this decision may petition for judicial review as specified in sec. 227.53, *Wisconsin Statutes* a copy of which is reprinted on side two of this sheet. By law, a petition for review must be filed in circuit court and should name as the respondent the party listed in the box above. A copy of the petition for judicial review should be served upon the party listed in the box above.

A petition must be filed within 30 days after service of this decision if there is no petition for rehearing, or within 30 days after service of the order finally disposing of a petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30-day period for serving and filing a petition commences on the day after personal service or mailing of the decision by the agency, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing this decision is shown above.)